ii. *Congress lacks constitutional power to supersede either expressly or by implication the States' reserved right to make criminal within their borders acts seeking overthrow of their own government by force and violence.*

There is some confusion in the record in the principal case by reason of the fact that the Pennsylvania Supreme Court has stated:

> ". . . It is only alleged sedition against the United States with which the instant case is concerned." *Appendix to Petition for Certiorari*, p. 70a.

This confusion arises by virtue of the fact that the indictment against Respondent, Steve Nelson, charged him with prohibited activities seeking the overthrow of the government of Pennsylvania and of the United States by force and violence.

See: *Appendix to Petition for Certiorari*, pp. 1-a, *et seq.*

Respondent, Steve Nelson, was convicted by the jury on twelve counts, all of which involved advocacy, incitement, or attempts to overthrow by unlawful means the State of Pennsylvania, as well as the United States government. Upon what basis the Pennsylvania Supreme Court concludes that it is only sedition against the United States with which it or the indictments are concerned is difficult to perceive.

Obviously, an act of sedition against Pennsylvania or New Hampshire, or any other State in the Union, is an act of sedition against the United States. Conversely, subversive activities designed to overthrow the Federal Government by force and violence are themselves an immediate threat to the safety and constitutional security of each and every one of the States. Other than in the District of Columbia or upon isolated locations exclusively subject to the jurisdiction of the Federal Government, such criminal activities must of necessity originate within the confines and jurisdiction of a State. To contend that the duty of suppressing such seditious criminal activities within a State rests exclusively upon the Federal Government is in fact to sanction the creation

of a national police force, which in country after country has been the principal medium through which totalitarian powers have been achieved by the human beings who happen to head the government at the time. At the rate at which communists, their supporters and dupes have been showing up in the various States in testimony presented to both State and Federal Committees, the personnel of The Federal Bureau of Investigation would have to be multiplied many times over to be in a position to do anything more than make a token gesture of adequacy if all local and state police are to be divested of jurisdiction in subversive cases. Nothing, it is respectfully submitted, would have more shocked the founding fathers of the Constitution or the people of the original signatory states than to have believed at that time that the greatest living document creating a republican form of government authorized the federal government to take from the States their basic right to make criminal, attempts to destroy their sovereignty, kill their loved ones if need be, and seize their homes.

See: *Nelson* v. *Wyman*, 99 N.H. 33; 105 A. 2d 756 (1954);
Fox v. *Ohio*, 5 How. 410, 434;
United States v. *Lanza*, 260 U.S. 377, 382.

As this Honorable Court has itself stated in *Allen-Bradley Local* v. *Board*, 315 U.S. 740, in distinguishing *Hines* v. *Davidowitz* (312 U.S. 52) at p. 749, l. 12:

> ". . . Nor are we faced here with the precise problem with which we were confronted in *Hines* v. *Davidowitz*, 312 U.S. 52. In the Hines Case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any 'concurrent state power that may exist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local

> matters as public safety and order and the use of streets and highways. *Maurer* v. *Hamilton*, (309 U.S. 598) *supra*, and cases cited. Here we are dealing with the latter type of problem. *We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.*" [Emphasis supplied]

And in *Reid* v. *Colorado*, 187 U.S. 137, at p. 148, l. 22, this Court stated:

> ". . . It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."

With all due respect to the sweeping hypotheses of the learned Justices of the majority in the Commonwealth of Pennsylvania, *Article IV*, section 4, of the *United States Constitution* does not authorize the Federal Government to exclusively usurp the field of anti-subversive legislation, sedition, or treason. An examination of *Article IV, section 4*, indicates quite plainly that it is the *political form of government* which is involved and that it was the design of the founding fathers to protect and preserve that republican form of government throughout the component members of the Union, as well as in the national government. Coupled with the constitutional mandate of *Article IV* that every State in the Union should be guaranteed a republican form of government is the enjoinder to ". . . protect each of them against invasion", and in fact against domestic violence, but even then only upon application of the State Legislature or its executive authority.

See: *Nelson* v. *Wyman*, 99 N.H. 33, 105 A. 2d 756 (1954);
Luther v. *Borden*, 7 How. 1 (1849)

Article IV, section 4, confers authority upon the Federal Government to aid and protect the States in the Union against invasion (and upon request, against domestic violence), and to insure that in no State should there come to pass a form of government opposed in principle and practice to the precepts of the Constitution. Exclusive federal control of conspiracy to subvert by in-

dividual citizens of the State and Nation is plainly not the purpose of this Article, nor does it by any stretch of tortured interpretation authorize Congress to pre-empt States' rights to proscribe such activity within their borders.

The *Tenth Amendment* to the *Constitution* provides expressly that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Certain powers in the *Constitution* are undoubtedly expressly granted to the Federal Government. These powers are set forth expressly in *Article I, section 8*. Under these express powers it has been held repeatedly by this Honorable Court that the national Congress may provide exclusive legislation. Such decisions have rested either upon the power to regulate commerce, coin money, punish counterfeiters, raise and support armies, establish uniform rules of naturalizations, and bankruptcies, among others. None of these enumerated express powers grants to the Federal Government the exclusive right to legislate in matters of subversion against State or Nation. The contention of the Pennsylvania Supreme Court that *Article IV, section 4*, is the door through which the Federal Government may pre-empt State legislation in this field is illogical and unreasonable in the extreme as is the Court's statement (*Appendix to Petition for Certiorari*, p. 70a, l. 22) that it has not found a single word indicating a seditious utterance directed against the government of Pennsylvania. One needs look no further than daily events to see Communist activities all over the world pointed in starkly dramatic yet tragic fashion directly at the eventual destruction of the United States of America, meaning Washington, D. C., and each single sovereign State. The destruction of either inescapably involves the other.

The *United States Constitution* may perhaps be likened to a life contract between the States and the Federal Government. Under its common roof we all live—the father, Federal Government; the mother, States with the people therein, who are at once

both citizens of their States and of the United States, owing allegiance to both sovereign powers. Immediate concern with any attempt to burn the house down is the joint responsibility of all who live under the same roof. It is simply untenable to contend that only father has the power under the contract to deal with individual citizens who seek to destroy the home. The *Constitution* just does not give father this exclusive power. There was no father Federal Government until the people created it by compact (Constitution) between the States. Anti-subversion statutes sedition statutes, treason statutes—all and seriatim, involve no specialized area of foreign policy, commerce, immigration or other federal paternal orbit in which great harm and confusion might result from varying formulae for proscription of subversion in the several States.

The Sovereign States have reserved police power to prohibit subversive or seditious activities, whether directed ostensibly at their own government or at the government of the United States. The two are inseparable in this light, and it is the clearest possible correlative concern of each of the States of the Union to prohibit attempts to overthrow either the State or the Federal Government by force and violence.

See: *Halter* v. *Nebraska*, 205 U.S. 34;
Gilbert v. *Minnesota*, 254 U.S. 325;
Gitlow v. *New York*, 268 U.S. 652;
Kelly v. *Washington*, 302 U.S. 1;
Thornhill v. *Alabama*, 310 U.S. 88, 105;
Dennis v. *United States*, 341 U.S. 494;
Nelson v. *Wyman*, 99 N.H. 33, 105 A. 2d 756 (1954);
State v. *Holm*, 139 Minn. 267;
People v. *Most*, 171 N.Y. 423.

There are many other interests of a State which justify State anti-subversive legislation, including the dangers of riot, local insurrection, and other public disturbances which are inherent in advocacy of subversive doctrine amongst loyal citizenry. If some of the States see fit to be tougher on subversives than others, that is their business. The *Constitution* does not authorize the Federal Government, directly or indirectly, to take away from them their

fundamental reserved police power to so legislate in their own self-defense. Provided no other provision of the Federal Constitution is violated by a State in the process of its local legislation in these fields, it is the reserved police power of each State under the *Tenth Amendment* to provide such laws as its legislature may see fit to enact against attempts to overthrow it.

II. NO COMPELLING REASON FOR SUPERSESSION EXISTS

The provisions of the *Smith Act* are contained in less than a single page of printed material. One has only to glance at their content and context to observe that they are not sweepingly all-pervasive. On the contrary, they merely contemplate concurrent State and Federal jurisdiction of subversion. In the language of a recent note in the *Harvard Law Review*, (67 Harv. L. Rev., No. 8, pp. 1419, 1420, l. 17):

> "State prosecutions of acts which are seditious as to the state would present the same possibility of interference with the administration of the federal statute, however, since what is subversive as to one government would ordinarily also be subversive as to the other. Thus, it would appear that if Congress intended to occupy the field in order to prevent such interference, it must have intended to exclude the imposition of criminal sanctions for most acts of subversion against the state. But, although the United States guarantees each state a republican form of government, *United States Constitution, Article IV, section 4*, it would not seem proper to confer that intent since to deprive the state of the ability to protect itself would amount to such limitation on its sovereignty as to be of doubtful constitutionality. Moreover, the legislative history of the Internal Security Act of 1950 indicates that at that time Congress did not believe the Smith Act had occupied the field. See, House Report No. 2980, 81st Congress, 2nd Session, 2 (1950); House Report No. 1950, 81st Congress, 2nd Session, 25-43, (1950) (Un-American Activities Committee)." (emphasis supplied).

The danger to State sovereignty implicit in the decision of the Pennsylvania Supreme Court is quite apparent. The decision as

now stands, if not reversed by this Honorable Court, threatens ll State anti-subversive laws, or State antisedition statutes, and fact casts grave question on even statutes of the various States roscribing treason. All such State statutes involve lawful exercise f the reserved constitutional powers of the States. In *Hines* v. *Davidowitz*, 312 U.S. 52, it was pointed out by Mr. Justice Stone his dissenting opinion, at page 77 that:

> "The existence of the national power to conduct foreign relations and negotiate treaties does not foreclose state legislation dealing exclusively with aliens as such. . ."

nd at p. 75, Mr. Justice Stone emphasized the need to protect he States against the tendency of the National Government to rasp more and more power for itself:

> "Assuming, as the Court holds, that Congress could constitutionally set up an exclusive registration system for aliens, I think it has not done so and that it is not the province of the courts to do that which Congress has failed to do.
>
> "At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted. . . . The Judiciary of the United States should not assume to strike down a state law which is immediately concerned with the social order and safety of its people unless the statute plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern."

a. *The States and the Federal Government have concurrent jurisdiction to make criminal, sedition or subversion against the United States.*

Discussing for the moment only the right and power to legislate concerning sedition or subversion against the Federal Government, as distinct from sedition or subversion solely against the sovereignty of the States, it is settled law that the States and the Federal Government together have concurrent jurisdiction to make sedition or subversion against the United States a crime.

> "Offenses which are directed against the sovereignty of a state, or which directly affect the state or its population, while punishable in such state, notwithstanding the fact that such offenses are also directed against the sovereignty of the federal government, unless the constitution gives the federal government exclusive jurisdiction over the offense; and even where the federal courts have exclusive jurisdiction over one aspect of an offense, this does not prevent a state court from prosecuting another aspect of the same offense . . ." 1 *Wharton's Criminal Law*, (12th Ed.), s. 307, 2 (1932).

Treason against a State is also treason against the United States. As set forth in Vol. 3, *Wharton's Criminal Law* (12th Ed.), s. 2183:

> "The principle is as follows: Wherever a particular state in a confederacy has reserved to it the right of prosecuting in its own name and as against its own people and dignity, offenses committed within its borders; and it has the juridical right to maintain its integrity by prosecuting for treason subjects who attack its political existence. If we apply this test, there can be no question that the right to prosecute for treason against themselves is reserved to the particular States of the American Union. Each of these, not only by its own constitution and laws, but in accordance with repeated recommendations of the federal Supreme Court, prosecutes as against its own people and dignity, all offenses except those aimed specifically at the delegated powers of the federal government."

See: *State* v. *Whittemore*, 50 N.H. 245, 247 (1870); where the honorable and distinguished former Chief Justice of the Supreme Court of New Hampshire, Jeremiah Smith, in disposing of a contention that perjury committed in a state court relative to application for naturalization under the laws of the United

States, was not indictable in the court of New Hampshire as an offense against New Hampshire, said:

> ". . . We have concluded that the offense is punishable under the state law, although it may also be punishable under the United States law. . . ."

He then quoted with approval the reasoning of Grier, J. in *Moore v. Illinois*, 14 How. 13, pp. 19, 20:

> "'Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault, or a murder, and subject the same person to a punishment under the State laws, for a misdemeanor or felony. That either or both may, if they see fit, punish such offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one, in bar to conviction by the other; consequently, this court has decided in the case of *Fox v. The State of Ohio*, 5 How. 432, that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practiced on its citizens; and, in the case of the *United States v. Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.'"

It is doubtful whether Congress has power to expressly preempt State laws making it a crime to commit sedition or subversion against the United States within their respective borders. The State legislation struck down by the Pennsylvania Supreme Court is vitally concerned with the social order and safety of the people of the Commonwealth of Pennsylvania. It is respectfully submitted that any attempt within a State to overthrow the gov-

ernment of the United States by force and violence is at once, and *per se*, a clear and present danger to the sovereignty of the State itself. In terms of humanities, it is a threat to the life, liberty, property, and pursuit of happiness of each individual citizen of Pennsylvania, whether he is a state government official or engaged in private pursuits. The relationship between the States and the Federal Government for purpose of sedition and subversion is in all respects practically identical insofar as danger to either from threatened overthrow of the other by force and violence is concerned. Whether this principle may be carried to the extent of including a right within a State to make criminal an attempt to overthrow the government of another State, as distinct from the national government, is not involved in the present case. As a matter of fact, the problem of whether Congress might expressly pre-empt State anti-subversive laws insofar as they attempt to proscribe subversion against the Federal Government, is also putative inasmuch as for the reasons outlined previously in this brief, Congress has not done so.

The *Smith Act* itself does not constitute Federal legislation in a field in which the Constitution has granted the Federal Government authority for exclusive legislation. It does not fall within the treaty-making power, foreign policy, interstate commerce, naturalization, bankruptcy, declaration of war, maintenance of armed forces, coinage, insurrection, nor invasion categories. It has been suggested that the power is contained in *Article I, section 8*, which provides:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Again, for reasons hereinabove stated, it is believed that this granted power deals with military and social legislation and never was intended by the authors of the Constitution to expressly grant to the Federal Government the power to exclude the rights of the States to themselves, punish those who within their borders seek to overthrow the national government by force and violence.

III. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IS CONTRARY TO AUTHORITY

A careful examination of the authorities cited in the majority opinion of the Supreme Court of Pennsylvania in this case compels the conclusion that, with all due respect to the learned justices, they do not support the conclusions drawn from them by the Court. It would be beyond the proper scope of this brief *amicus curiae* to discuss each and every case cited therein lest this brief assume disproportionate length. As stated in the *Preliminary Statement, supra*, p. 6, this brief is directed solely to the proposition that the opinion of the majority in the principal case has grievously erred in its conclusion of implied federal supersession of state laws. In its opinion, at p. 63a of the *Petition for Certiorari*, the Supreme Court of Pennsylvania has stated:

> "If the Pennsylvania Act was so superseded, then the defendant's conviction cannot be sustained."

By the majority's finding of implied supersession there was rendered unnecessary any further consideration of issues of double jeopardy, double punishment, passion, or prejudice, or other matters properly to be previously determined by the highest court of the Commonwealth of Pennsylvania before coming to the Honorable Court of Review. Study of the authorities cited by the Supreme Court of Pennsylvania in support of their conclusion of implied supersession reveals a total lack of apt precedent to support the conclusions stated.

Tennessee v. *Davis*, 100 U.S. 257, concerned the removal of a revenue officer's murder trial to a federal court. It involved facts directly related to a power expressly granted to the Federal Government by the Constitution, to wit, the power to lay and collect taxes.

See. *Constitution, Art.* I, *s.* 8.

Rice v. *Santa Fe Elevator Corporation*, 331 U.S. 218, involved a warehouse licensed under the United States Warehouse Act, a federal pronouncement by virtue of express authority granted to

the Federal government to regulate commerce amongst the several states.

Likewise, all of the cases cited by the majority on pages 65a and 66a find the same common denominator, namely, express or implied supersession by virtue of authority granted to the Federal Government by clear provision of the Constitution. Even *Hill* v. *Florida*, 325 U.S. 538, involved a conflict between state law and the National Labor Relations Act and was justified under the commerce clause. *Hines* v. *Davidowitz*, 312 U.S. 52, finds a comprehensive provision for alien registration authorized by virtue of the express grant to the Federal Government concerning foreign policy and treaty power. As Mr. Justice Black so aptly stated in the majority opinion, p. 62, 67:

> ". . . That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of *The Federalist* in 1787 and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. . . . The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . .
> "Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; . . ."

None of the reasons compelling the conclusion of supersession reached in the *Hines* case apply with force to the case presently before this Honorable Court. On the contrary, legislation in the various states dealing with their security and with the public

safety under their reserved police power does not conflict with the federal *Smith Act* but is entirely complementary to it. Even *Savage* v. *Jones*, 225 U.S. 501, 533, relied upon by the majority as authority for "that which needs must be implied" (p. 66a) derived authority for paramount federal legislation from the express power of the commerce clause.

For the next six pages of its opinion, the majority cites no authority whatever, and at p. 73a, in discussing and attempting to distinguish *United States* v. *Lanza*, 260 U.S. 377, the opinion of the majority merely categorically states its conclusion that that authority for concurrent jurisdiction is inappropriate as not akin to sedition. Likewise, in dismissing the authority of *Fox* v. *Ohio*, 46 U.S. 410, (5 How. 410) it speaks of two separate offenses—one, federal and the other, state. This is submitted to be inaccurate for the reason that one and the same Act is involved, as is more fully emphasized in the case of *People* v. *Fury*, 279 N.Y. 433, where at p. 437 the New York Court of Appeals said:

> "The fact that the federal government has made the uttering of counterfeit bank notes a crime does not bar the state from including a similar crime in its penal law. The jurisdiction of federal courts over such crime is not exclusive unless Congress enacts legislation taking away the jurisdiction of the courts of the state. . . . It has long been decided that both governments may have concurrent jurisdiction over the emission of counterfeit monies."

And counterfeiting is an offense directly related to the power to coin money, which is by the Federal Constitution expressly granted to the Federal Government.

An examination of the facts and decision in *Gilbert* v. *Minnesota*, 254 U.S. 325, indicates compelling authority in support of the Petition for Certiorari. In that case, which involved a Minnesota law prohibiting advocacy of non-enrollment in the U. S. armed forces and non-assistance to the United States in the prosecution of war vis-a-vis the Federal Espionage Law enacted in 1917, 40 Stat. 217 this Honorable Court expressly held (McKenna, J.), p. 329, 331:

". . . The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the states as well as the United States are intimately concerned. . . . Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties, and resistance in each to any cooperation from the other, but there is opposing demonstration in the fact that this country is one composed of many, and must on occasion be animated as one, and that the constituted and constituting sovereignties must have power of cooperation against the enemies of all. . . .

"[The state may make] the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes."

IV. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA HAS BEEN EXPRESSLY REJECTED BY A SUBSEQUENT DECISION OF THE SUPREME COURT OF NEW HAMPSHIRE

In *Nelson* v. *Wyman*, 99 N.H. 33, 105 A. 2d 756, the Supreme Court of New Hampshire rejected the contention before it that *Article IV, section 4* of the Federal *Constitution*, constituted a constitutional grant of authority to the Federal Government to pre-empt State anti-subversive legislation. The Court said, in part (105 A. 2d 756, 769):

"Whatever inference has been ascribed to these duties and powers in decisions dealing with federal legislation, their existence has not been applied in connection with state legislation, to exclude consideration of the well recognized power of each state to regulate the conduct of its citizens and to restrain activities which are detrimental not only to the welfare of the state but of the nation. 'The state is not inhibited from making the national purposes its own purposes to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes.' *Gilbert* v. *Minnesota*, 254 U.S. 325, 331. 'There is nothing in the federal constitution in any way

granting to the federal government the exclusive right to punish disloyalty. *People* v. *Lloyd*, 304 Ill. 23, 33."

Nelson v. *Wyman, supra*, was argued before the Supreme Court of New Hampshire on January 22, 1954. The decision in *Commonwealth* v. *Steve Nelson* was handed down on January 25, 1954. At this point, and prior to the decision of the New Hampshire Supreme Court, counsel for petitioner in New Hampshire filed with the Court a Supplemental Memorandum urging a conclusion of supersession such as was rendered in Pennsylvania. A part of petitioner's argument, while admitting that the same act might simultaneously constitute an offense against the United States and an offense against the State, urged that this did not justify two different governmental units attempting to punish the act as a crime against the United States. In further reference to an allegedly paternal federal-state governmental scheme, petitioner urged the astonishing proposition that:

> "... For example, if revolution in New Hampshire was successfully attempted and a republican form of government was created to supplant the present government the people in New Hampshire would be within their rights in the revolutionary act and there would be no occasion for the federal government to interfere."

After a full consideration of the majority and minority opinions in the principal case, the Supreme Court of New Hampshire, on April 30, 1954, expressly rejected the decision of the Supreme Court of Pennsylvania in the following language (105 A. 2d 756, 769):

> "The enactment by Congress of the Smith Act (18 USC s. 2385) which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. *Insofar as Pennsylvania* v. *Nelson*, —— Pa. ——, *decided January 25, 1954, gives support to the proposition that it does, we do not adopt it.* Police powers of the state are not superseded by federal legislation except where state action is either specifically prohibited or 'that was the clear and

manifest purpose of Congress.' *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. The interest of the state, in the protection of which it now seeks to exercise its police power, is that 'primary and essential right of self-preservation, which, so long as human governments endure . . . cannot be denied' to it. *Gitlow* v. *New York*, 268 U.S. 652, 668. The Smith Act does not specifically exclude state action in support of this right and we do not believe that its provisions are such as to evidence a 'clear and manifest purpose of Congress' to pre-empt the entire field of legislation and deny the state's right to act in defense of it." [Emphasis supplied]

Conclusion

It is respectfully submitted that the decision of the Supreme Court of Pennsylvania is in error; that it involves serious inaccuracies in interpretation of decisions of this Honorable Court and of the Constitution under which the judicial system of the nation is constituted; that each of the United States has the reserved power to proscribe subversion or sedition against the States and against the sovereignty of the Federal Government, or either of them, conjunctively or disjunctively; and that the Petition for Certiorari should be granted, the decision of the Supreme Court of Pennsylvania reversed, and the cause remanded to Pennsylvania for further disposition on the record.

Respectfully submitted,

Louis C. Wyman
Attorney General
The State of New Hampshire

September 20, 1954.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 296

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

STEVE NELSON,
Respondent.

BRIEF OF AMICUS CURIAE, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

LATHAM CASTLE,
Attorney General of the State of Illinois,
Amicus Curiae.

GREENVILLE BEARDSLEY,
JOHN L. DAVIDSON, JR.,
WILLIAM C. WINES,
Assistant Attorneys General,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 236.

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

STEVE NELSON,

Respondent.

BRIEF OF AMICUS CURIAE, LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Amicus curiae, Latham Castle, Attorney General of the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause.

STATEMENT IN SUPPORT OF PRAYER OF AMICUS CURIAE

For more than thirty-five years the General Assembly of Illinois by law has proscribed sedition. The validity of those statutes were sustained by the highest tribunal of Illinois. *People* v. *Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922).

For the convenience of the court, the Illinois statutes which may be involved are affixed as Appendices A and B.

The opinion of the Supreme Court of Pennsylvania in this cause casts serious doubt upon the validity of those statutes. Unless the decision of the Supreme Court of Pennsylvania is reversed, an important segment of the police power of Illinois is in jeopardy. Illinois will have no power to protect itself against subversives. It will be asserted that power to punish disloyalty is vested solely in the Federal government. To sustain the decision of the Supreme Court of Pennsylvania in this cause is to cast into jeopardy the long-established authority represented by decisions of this court and of courts of last resorts of several states.

A majority of the Supreme Court of Pennsylvania have found that Congress intended to supersede State legislation on subversive activities. They quote from *Savage* v. *Jones*, 225 U. S. 501, 533, as follows:

> "* * * For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and *that which needs must be implied is of no less force than that which is expressed.*" (Appx. Pet. for Cert. pp. 66a.)

Section 3231 of the Federal Code of Crimes and Criminal Procedure of 1948 provides:

> "The district courts of the United States shall have

> original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

As pointed out in petitioner's brief at pp. 43-45, "Nothing in this title" refers to Title 18 which includes the Smith Act. Thus, doubtful implication is held to override clear expression.

The majority of the Supreme Court of Pennsylvania further justify supersession as follows:

> "* * * When, therefore, a State assumes to punish, as does the Pennsylvania statute here involved, sedition against the United States, it is intruding in a matter where the national interest is obviously paramount. It follows necessarily that the Federal Government's control of the field must be exclusive if it is to protect itself effectively and completely. And that means no sharing of the jurisdiction with the States." (Appx. pp. 69a, 70a.)

This, we respectfully submit, is a *non sequitur*. The *reductio ad absurdum* of this position is that every time Congress legislates on any subject, all State legislation in that field, though complementary and not repugnant to Federal law, will nevertheless be automatically suspended and superseded. The police power of the State would then exist only by virtue of congressional indulgence. Federalism, as we have known it, will be destroyed and the state reduced to the impotent status of a French department.

The cunning subversive, the secret agent of an alien government, and the lurking saboteur each represents as great a threat to the peace and dignity of the State of Illinois as they do to the national government. It is imperative that the citizens of Illinois be protected against them.

The State of Illinois endorses the argument of the Commonwealth of Pennsylvania. Authority to sustain the points of petitioner has been adequately presented in its brief. A further review of case authority or extended argument is deemed unnecessary. Our position is clearly and succinctly put by Judge Bell in his dissenting opinion:

> "The analogous decisions of the Supreme Court of the United States, the preservation of the police power of every Sovereign State in the United States, and—most important of all—the protection, safety and security of our Country imperatively require that the Pennsylvania Sedition Act be sustained." (Appx. Pet. for Cert., p. 81a.)

CONCLUSION.

We respectfully urge the petition of the Commonwealth of Pennsylvania for a writ of certiorari be granted.

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Amicus Curiae.

GRENVILLE BEARDSLEY,
JOHN L. DAVIDSON, JR.,
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Of Counsel.

APPENDICES.

The Following Statutes of the State of Illinois Relating to Subversive Activities will be Affected by a Construction of Section 2385 of the Federal Code of Claims and Federal Procedure of June 25, 1948, 62 Statute 808, 18 U. S. C. A., 2385:

A.

"*Advocating overthrow of government.* It shall be unlawful for any person openly to advocate, by word of mouth or writing, the reformation or overthrow, by violence or any other unlawful means, of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the Constitutions of the several states." Illinois Revised Statutes, 1953, Chapter 38, Section 558.

"*Utterance of paper advocating overthrow of government.* It shall be unlawful for any person to publish, issue or knowingly sell or distribute any book, paper, document or other written or printed matter which advocates crime and violence, as a means of accomplishing the reformation or overthrow of the constitutional representative form of government so secured to the citizens of the United States and the several states." Illinois Revised Statutes, 1953, Chapter 38, Section 559.

"*Societies to overthrow government.* It shall be unlawful for any person to organize, aid in the organization of, or become a member of any society or association, the object of which is to advocate the reformation or overthrow of the existing form of government, by violence or any other unlawful means." Illinois Revised Statutes, 1953, Chapter 38, Section 560.

"*Attendance at meeting.* It shall be unlawful for

any person voluntarily and with knowledge of the purpose of such meeting or assembly to be present at any meeting or assembly at which the reformation or overthrow of the existing form of government, by crime and violence is advocated." Illinois Revised Statutes, 1953, Chapter 38, Section 561.

"*Use of premises.* It shall be unlawful for any person owning, possessing or controlling the use of any room, building or other premises, knowingly to permit the same to be used as the headquarters of any organization which advocates crime and violence or as a meeting place for any meeting or assembly at which crime and violence is advocated, as a means of accomplishing the reformation or overthrow of the existing form of government." Illinois Revised Statutes, 1953, Chapter 38, Section 562.

"*Display of emblems.* It shall be unlawful to display or exhibit at any meeting, gathering or parade, public or private, any flag, banner, emblem or other insignia, symbolizing or intending to symbolize a purpose to overthrow by force or violence or by physical injury to person or property of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the Constitution of the State of Illinois." Illinois Revised Statutes, 1953, Chapter 38, Section 563.

"*Penalty.* Any person who shall violate sections 265a, 265b, 265c or 265f of this Act shall be deemed guilty of a felony, and upon conviction therefor shall be punished by imprisonment in the penitentiary for a period of not less than one year nor more than ten years. Any person who shall violate sections 265d and 265e of this Act shall be deemed guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for a period of not less than six months nor more than one year, or both." Illinois Revised Statutes, 1953, Chapter 38, Section 564.

"*Aiding rebellion, riot, etc.* Any person who, for

the purpose of inciting or aiding rebellion, riot or insurrection in this state against the government or laws of this state or of the United States, or a hostile invasion of this state, shall transmit, or cause to be transmitted by telegraph any communication whatever, shall be imprisoned in the penitentiary not exceeding ten years." Illinois Revised Statutes, 1953, Chapter 134, Section 10.

B.

The following statutes will be affected indirectly in so far as they are applicable to subversive activities.

"*To do an illegal act—Boycott—Black list.* If any two or more persons conspire or agree together, or the officers or executive committee of any society or organization or corporation, shall issue or utter any circular or edict, as the action of or instruction to its members * * * or to do any illegal act injurious to the * * * police, or administration of public justice * * * or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be fined not exceeding $2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary." Illinois Revised Statutes, 1953, Chapter 38, Section 139.

"*Against state, etc. Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That if two or more persons conspire either to commit any offense against the State of Illinois, or any county, incorporated city, village, town or township thereof, or to defraud the State of Illinois, or any county, incorporated city, village, town or township thereof, in any manner, or for any purpose, and one or more of such parties, do any act to effect (affect)

the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not less than one hundred dollars, and not more than five thousand dollars, and to be imprisoned in the penitentiary for a term of not less than one year nor more than two years or imprisonment in the county jail for any period not exceeding two years. Provided, however, this Act shall not be construed to modify or repeal any other law in force in this State." Illinois Revised Statutes, 1953, Chapter 38, Section 140.

"*Unlawful assembly.* If two or more persons shall assemble together to do an unlawful act, and separate without doing or advancing towards it, such persons shall be deemed guilty of an unlawful assembly, and be severally fined not exceeding $100.00 Illinois Revised Statutes, 1953, Chapter 38, Section 506.

"*Unlawful assembly.* If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coroner, constable or other public officer, the person so offending shall be severally fined not exceeding $200.00." Illinois Revised Statutes, 1953, Chapter 38, Section 507.

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 236.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON,
Respondent.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE.

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Supreme Court of the United States.

OCTOBER TERM, 1954.

No. 236.

COMMONWEALTH OF PENNSYLVANIA,
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v.

STEVE NELSON,
Respondent.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE.

This brief of the Commonwealth of Massachusetts is filed as amicus curiae under Rule 42 of the Supreme Court of the United States in the case of *Commonwealth of Pennsylvania* v. *Steve Nelson*, October Term, 1954, No. 236, reported below in 377 Pa. 38, 104 A. (2d) 133, reargument denied in 377 Pa. at page 60, certiorari granted, 348 U.S. 814. Jurisdiction of this court was invoked under 28 U.S.C. § 1257(3). Since this brief is sponsored by the Attorney General of Massachusetts, consent of the parties is not required.

Massachusetts adopts the Questions Presented for Review and the Statutes Involved contained in the petition for certiorari of Pennsylvania at pages 4 and 5, and the Statement of the Case in said petition at page 9.

Interest of Amicus Curiae.

1. The Commonwealth of Massachusetts, by indictment returned September 1, 1951, in Middlesex County, charged that one Margaret Gilbert and one Martha H. Fletcher did, on January 1, 1947, and on divers other days between that date and the presentment of the indictment—

> "conspire together and with Dirk J. Struik and Harry E. Winner to advocate, advise, counsel and incite the overthrow by force and violence of the government of the Commonwealth of Massachusetts by speech, exhibition, distribution and promulgation of certain written and printed documents, papers and pictorial representations, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

This conspiracy charge was based on the Massachusetts sedition law, G.L. (Ter. Ed.) c. 264, sec. 11, as appearing in section 1 of chapter 160 of the Acts of 1948.

Section 11 provides:

> "SECTION 11. Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than three years, or both; provided, that this section shall not be construed as reducing the pen-

alty now imposed for the violation of any law. It shall be unlawful for any person who shall have been convicted of a violation of this section, whether or not any sentence shall have been imposed, to perform the duties of a teacher or of an officer of administration in any public or private educational institution, and the superior court, in a suit by the commonwealth, shall have jurisdiction in equity to restrain and enjoin any such person from performing such duties thereafter; provided, that any such restraining order or injunction shall be forthwith vacated if such conviction shall be set aside." (As amended by St. 1948, c. 160, sec. 1.)

This statute is similar to the Pennsylvania law in this case (R. 8a).

The Supreme Court of Illinois, on habeas corpus, upheld extradition to Massachusetts in that case on May 20, 1953, rehearing denied September 21, 1953; reported in *People, ex rel. Gilbert*, v. *Babb, Sheriff*, 415 Ill. 349.

A motion to quash said indictment, based on the Nelson decision, has been reported without decision to the Supreme Judicial Court of Massachusetts for a ruling on questions raised by the motion to quash, including the question of whether the Massachusetts law has been superseded by the federal Smith Act of 1940 or any other federal law. This case has been heard but not decided.

2. The Commonwealth of Massachusetts, in a second case, in Suffolk County, by indictment No. 2457, returned May 20, 1954, charged Daniel Boone Schirmer, Ann Burlak Thompson, Barbara Bennett Rosenkrantz, Herbert Zimmerman, Edith Abbei, Otis Archer Hood and Franklin P. Collier, Jr., on January 1, 1949

"and on divers other days and times between that day and the day of the presentment of this indictment, did conspire together to commit thereafter, from time to time and on different occasions as opportunity therefor should offer and not at any times then particularly set and fixed, the crime of advocating, advising, counseling, and inciting, by speech and exhibition, distribution and promulgation of written and printed documents, papers and pictorial presentations, assaults upon public officials, the killing of persons, the unlawful destruction of real and personal property, and the overthrow by force and violence and unlawful means of the government of the Commonwealth of Massachusetts and the government of the United States."

Motions to quash said indictment were reported to the Supreme Judicial Court without decision for a ruling on the questions raised by the motions, including a ruling on the question of whether the Smith Act of 1940 or the Internal Security Act of 1950 has superseded state sedition laws, such as section 11 of chapter 264, quoted above.

3. The Commonwealth of Massachusetts, by indictment No. 1924, returned April 8, 1954, in Suffolk County, charged that one Otis Archer Hood on the 17th day of November, 1951—

"and on divers other days and times between that day and the day of the presenting of this indictment, did become and remain a member of a certain organization, to wit: the Communist Party, knowing it to be a subversive organization."

This indictment was based on General Laws (Ter. Ed.) c. 264, sec. 19, as inserted by section 3 of chapter 805 of the Acts of 1951.

Section 19 provides:

"SECTION 19. Any person who becomes or remains a member of any organization knowing it to be a subversive organization shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than three years or both, provided that this section shall not be construed as reducing the penalty now imposed for the violation of any law." (As amended by St. 1951, c. 805, sec. 3.)

Section 16 provides:

"SECTION 16. The term 'subversive organization' as used in sections seventeen, eighteen, nineteen, twenty-one, twenty-two and twenty-three of this chapter shall mean any form of association of three or more persons, however named or characterized, and by whatever legal or non-legal entity or non-entity it be established, and whether incorporated or otherwise for the common purpose of advocating, advising, counseling or inciting the overthrow by force or violence, or by other unlawful means, of the government of the commonwealth or of the United States." (As amended by St. 1951, c. 805, sec. 3.)

Section 16A provides:

"SECTION 16A. The Communist Party is hereby declared to be a subversive organization." (As amended by St. 1951, c. 805, sec. 3.)

A motion to quash the indictment was reported to the Supreme Judicial Court without decision for a ruling on

the questions raised by the motion to quash, including the question of supersession.

This membership section is similar to the membership count in the Nelson indictment (R. 4a).

A ruling by this court on the question of supersession raised in this case will control the decision of the Supreme Judicial Court in the aforesaid cases. Therefore the Commonwealth is vitally interested in having this court sustain the Pennsylvania statute.

Argument.

The precise question here is whether the Pennsylvania Supreme Court erred in quashing the indictment on the ground that the Pennsylvania Sedition Law, Pennsylvania Penal Code, § 4207, was *impliedly* superseded as to sedition against the *federal* government by the corresponding provisions of the *Smith* Act, 18 U.S.C. § 2385.

It is not contended that the Smith Act expressly superseded the state law; only an implied intent is urged. Motion to Quash Indictment, I, i, Appendix to Petition for Certiorari, p. 22a.

Only supersession as to sedition against the federal government was found by the Pennsylvania Supreme Court. Opinion, Appendix to Petition for Certiorari, p. 64a. Consequently supersession as to sedition against the state government will not be discussed here.

The Pennsylvania court found supersession only by virtue of the Smith Act. Opinion, Supreme Court of Pennsylvania, Appendix to Petition for Certiorari, p. 63a. Therefore only the effect of the Smith Act will be dealt with here.

It is clear that Pennsylvania has the power to prohibit sedition against the federal government notwithstanding

that Congress has also prohibited such sedition. This has been settled since the case of *Gilbert* v. *Minnesota*, 254 U.S. 325 (1920), where this court rejected the contention that the Espionage Act of 1917, 40 Stat. 217, abrogated or superseded a state law which prohibited interference with recruiting for federal military forces. Note, "State Control of Subversion: A Problem in Federalism," 66 Harv. L. Rev. 327, 328 (1952).

The only question here is whether Congress intended to supersede state laws forbidding sedition against the federal government.

But where a state is acting under its police powers reserved by the Tenth Amendment this court has said:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

Schwartz v. *Texas*, 344 U.S. 199, 202-203 (1952) (federal law forbidding wire-tapping held not to exclude such intercepted communications from evidence in criminal proceeding in state court).

Where the state law conflicts with the federal law, or where the state law imposes greater affirmative burdens on non-criminals in fields peculiarly within the province of the federal government, it is easy to imply an intent to supersede. *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941) (state required registration of aliens who were citizens of allied nations).

Here the state and federal laws coincide; both forbid the same type of criminal activity directed against the federal

government. In fact, the respondent claimed double jeopardy in his later trial under the Smith Act. *United States* v. *Mesarosh*, 13 F.R.D. 180, 186 (1952).

Here the case is governed by *California* v. *Zook*, 336 U.S. 725 (1949), where a state court was reversed for dismissing a complaint on the ground that a state law (which prohibited the sale of transportation over the state's highways without a permit from the Interstate Commerce Commission) was superseded by a federal law containing substantially the same provision.

There the court said that—

> "the fact of identity does not mean the automatic invalidity of state measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent. . . . Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." 336 U.S. at 730, 731.

That decision was characterized by Mr. Justice Frankfurter in his dissent in these words:

> ". . . the Court today decides that the States can impose an additional punishment for a federal offense unless Congress in so many words forbids the States to do it." 336 U.S. at 739.

Looking at this case as a whole, ". . . we do not believe that [the Smith Act's] provisions are such as to evidence a 'clear and manifest purpose of Congress' to pre-empt the entire field of legislation and deny the state's right to act in defense of it." *Nelson* v. *Wyman*, 105 A. (2d) 756, 769 (N.H. 1954).

On the contrary, Representative Howard Smith, of Virginia, sponsor of the Smith Act, declared in debate on that bill: "This has nothing to do with state laws." 84 Cong. Rec. 10452 (1939).

Unless this is to be a "hypothetical case on normal Congressional intent," this statement alone should resolve any doubts in this case. See 336 U.S. at 733, note 9, and *Galvan v. Press*, 347 U.S. 522, 527 (1954).

Parenthetically it may be noted that, when the Internal Security Act of 1950, 64 Stat. 987 *et seq.*, was debated by the House, sitting as a committee on the Whole House, the chair ruled that ". . . the bill before the committee deals only with the Federal Government of the United States." 96 Cong. Rec. 13762 (1950).

But we will go further.

Another factor in determining the intent of Congress is the fact that Congress may not have the power to supersede state laws that do not conflict with federal laws in this field. United States Constitution, Amendment X.

The state is acting to protect itself when it prohibits sedition against the federal government.

In the first place, an attempted revolution against the federal government caused by sedition would involve physical acts of violence carried on within the boundaries of the states (except for the District of Columbia, etc.). This would include assaults against federal civil officials and federal troops, and attacks on national defense industries and federal office buildings. All this would endanger the lives and properties of the citizens of the states. The revolutionists would have to be very careful not to injure state property by accident. The power of a state to prohibit sedition to prevent such disorders against government was upheld in *Gitlow v. New York*, 268 U.S. 652, (1925).

In the second place, a successful revolution against the United States, even one involving no fighting in Pennsylvania, which established a totalitarian dictatorship would jeopardize certain rights guaranteed to citizens of states under our present constitution. These include the right to a republican form of government, the right to elect senators and representatives to Congress to participate in making the laws, the rights guaranteed to states under the Tenth Amendment, and the civil rights of citizens protected from federal encroachment by the first ten amendments.

Relevant here is the nature of the power of Congress to prohibit sedition against the federal government.

Congress does not have the power to provide for the common defense specifically spelled out in the Constitution. It does have the power to "lay and collect Taxes, . . . to pay the Debts and provide for the common Defence . . .". United States Constitution, Art. I, § 8. Madison pointed out the distinction in The Federalist, No. 41, at 269 (Modern Library ed. 1941).

It was assumed in the *Dennis* case that the United States has the power to prohibit armed rebellion without discussing where that power was enumerated in the Constitution. *Dennis* v. *United States*, 341 U.S. 494, 501 (1951).

The duty of the federal government to guarantee to every state in the Union a republican form of government does not give Congress an unlimited power to interfere in the internal affairs of the states. United States Constitution, Art. IV, § 4. The secondary nature of the word "guarantee" here was emphasized by Madison in the Federalist, No. 43, at 283 (Modern Library ed. 1941). The reluctance of the founding fathers to permit federal interference in state affairs is further emphasized in this section by the requirement that the federal government may

protect against domestic violence only "upon application of the Legislature, or of the Executive (when the Legislature cannot be convened) . . ."

Congress therefore would be on shaky ground if it claimed power to forbid states from acting in this field.

If Congress does have the power to prohibit states from protecting their interest in the present form of federal government, then state sovereignty is indeed compressed to the very narrowest of limits. We do not concede that Congress does have such a power. Congress does not need such a power since there is ample room for both the federal and state governments to operate in this field. Cooperation between the federal and state prosecuting officials may be presumed, and the brief of the Solicitor General will reveal whether such cooperation is desired by the federal executive. (Even the United States Attorney General is bound to operate within the terms laid down by Congress, however, and if Congress commands cooperation, he will be bound by the will of Congress.)

But before we decide whether Congress possesses such a power we should determine whether Congress claims such a power.

We would expect long and earnest debate with expressions of strong resistance from exponents of states' rights before words claiming such power were put into the Smith Act. Instead, we find the Act silent, and the sponsor expressly disclaiming any intent to claim such a power.

Is this the sort of record that "is a clear manifestation of intention" to supersede?

To be consistent, this court, if it found that Congress had the power to supersede state laws prohibiting sedition against the federal government, would have to find that state laws superseded that part of the Smith Act prohibiting sedition against the state governments.

Such a holding would then conflict with the power of the federal government to guarantee to each state a republican form of government—a valuable protection to the states when they are unable to protect such republican form themselves.

These constitutional questions may explain why Congress did not expressly claim in the Smith Act the power to supersede state laws not in conflict with that Act. In any event, it is clear that Congress did not expressly claim such a power of supersession.

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication [citing cases], should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation. . . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

Penn Dairies, Inc. v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261, 275 (1943).

Intent is the key. Since Congress did not intend to claim a power of supersession as to laws not in conflict with the

Smith Act, this court should hold that the Pennsylvania Sedition Law is not superseded by implication.

Conclusion.

The Supreme Court of Pennsylvania should be reversed.

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No. 10

In the

Supreme Court of the United States

OCTOBER TERM, 1955

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

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No. 10

In the

Supreme Court of the United States

October Term, 1955

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

STEVE NELSON,
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

AUTHORITY FOR FILING BRIEF HEREIN BY THE AMERICAN LEGION AS AMICUS CURIAE

This Brief is filed by The American Legion, *amicus curiae*, pursuant to Rule 42(2), Revised Rules of the

Supreme Court adopted April 12, 1954 and effective July 1, 1954.

PRELIMINARY STATEMENT

The respondent, Steve Nelson, was indicted October 17, 1950 (Vol. I, P. 9, et seq.) in the Court of Quarter Sessions, Allegheny County, Pennsylvania, under the Pennsylvania Sedition Act (Sec. 207 of Pennsylvania Penal Code of June 24, 1939, Pamphlet Laws 872, 18 Purdon's Stat. Ann. Sec. 4207). He entered a plea of not guilty and on December 22, 1950 filed a motion to quash the indictment (R. 24), which, after consideration, was dismissed by the court on December 26, 1950. (Vol. I, R. 28) Following a trial which commenced December 4, 1951 and ended January 30, 1952, a verdict of guilty was returned by the jury on the latter date. (Vol. I, R. 7) His motion for a new trial and arrest of judgment were denied by the court in an opinion filed by Judge Montgomery on June 26, 1952. (Vol. I, R. 28, et seq.)

He appealed to the Superior Court of Pennsylvania, which affirmed by a *per curiam* opinion the judgment of the Court of Quarter Sessions. (Vol. I, R. 50) Following this, an appeal was taken to the Supreme Court of the Commonwealth of Pennsylvania and on January 25, 1954 that court, by a majority decision, reversed the lower court and quashed the indictment. (Vol. I, R. 50 et seq.)

Following this decision, a Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District, was granted by this court. (Vol. II, R. 1421)

In this brief, the Legion as *amicus curiae*, will support the petitioner, setting forth the reasons why it believes the decision of the Supreme Court of the Commonwealth of Pennsylvania, should be reversed.

Our organization was originally chartered by Act of Congress September 10, 1919 (USCA Tit. 36, Secs. 41-51, inc.). It is composed of fifty-eight Departments, forty-nine of which are located within the continental limits of the United States, each of the latter being within the confines of the respective states and the District of Columbia, which are, in turn, organized into more than 17,000 Posts with a total membership in excess of 2,700,000, limited to veterans of World War I, World War II and the Korean hostilities.

The Legion has a profound interest in the questions presented in this case, in view of the fact that it has been in the forefront in the fight against Communism since its inception. It has witnessed the progress of this philosophy, which now embraces a large portion of the world. It has seen it creep into the communities of our nation, a philosophy entirely foreign to the American way of life, which is seeking to destroy the fundamental principles upon which this nation was founded by our forefathers.

Our efforts to combat the ideologies of Communism have been conducted, not only on the Post level in every community, but also on the Department and National levels as well, and it is the concensus of our entire organization that success will only be attained by the close cooperation of every individual, community, state and the Federal Government if it is to be won. Consequently, we consider the final decision in this case to be of prime importance to the nation.

We believe that the several states are charged with the duty of preserving peace and order within their respective borders and that they must be accorded the right to punish those who advocate the overthrow of our government by force, as its destruction would result in their annihilation;

and that the "Smith Act" should be considered as complementing the state legislation rather than pre-empting the field on this subject, as "the same act may be an offense or transgression of both Nation and state, and both may punish it without a conflict of their sovereignties."

We further believe that freedom of speech and freedom of the press should always be fully protected, but when they are employed for the purpose of destroying the structure of government, under which the right is given, by other than peaceful means, the guilty should be punished. If not, it will undoubtedly result in the destruction of our priceless heritage, which must be averted by every legal means available.

Inasmuch as the parties to this action, in their respective briefs, have supplied or will supply the opinions below, the jurisdiction of the court, the questions presented, the full statement of the case and its decision, we shall avoid repetition herein.

STATUTES INVOLVED

The pertinent Statutes are set forth in App. I and App. II of this brief.

SUMMARY OF ARGUMENT

Point 1. In the adoption of the so-called "Smith Act," Congress did not pre-empt the field of legislation covered thereby and its adoption did not void the Sedition Act of 1939 adopted by the Legislature of Pennsylvania and under which the respondent was convicted. The Federal legislation neither expresses nor implies such an intent nor is the subject matter one with which the Federal Government is solely concerned. The same act may be an offense or transgression of both Nation and state and both may punish it without a conflict of their sovereignties. The United States is composed of the states, the states are constitated of the citizens of the United States, who are also citizens of the states. Thus a citizen owes allegiance to two sovereigns and may be liable for an infraction of the laws of either or both, as the same act may constitute an offense or violation of the laws of both. Supersession never occurs unless there is a conflict or repugnance which is so direct and positive that the two acts cannot be reconciled or consistently stand together and neither conflict nor repugnance to the other is reflected in either act.

The administration of criminal justice under our federal system has always rested with the states except as such offenses have been explicitly prescribed by Congress, and prescription should never be applicable where the two acts may be consistently enforced. In the exercise of its reserve powers a State has the right, yes the duty, to punish acts which endanger not only its continued existence but the existence of the Nation as well, and in the instant case the two statutes are complementary and should be

interpreted so that the purposes of both may be effected. The fact that a greater penalty for transgressions under the state act is imposed than those under the federal legislation is no reason in support of the contention that there is conflict, as it is directed at an evil where experience indicates it to be most felt, namely, the state, and its legislation must be co-extensive with the practical need.

Point 2. State legislation defining sedition and syndicalism and fixing penalties for the violation thereof has been in existence for more than one hundred years, as the first state legislation on this subject was passed shortly after the adoption of the Federal Constitution. These laws have been upheld by the Supreme Court in many instances where their validity has been questioned, as their aim has been the preservation of law and order in the respective state jurisdictions. It would be fatal at this time to tear down this great mass of state legislation by holding that the "Smith Act" was all-inclusive and that it superseded similar state legislation, as a state is not prohibited from making the national purposes its own purposes, and it may exercise its reserve powers to prevent its own citizens from the accomplishment of these purposes. There is no provision in the Federal Constitution which gives the federal government the exclusive right to punish disloyalty. Communism, which advocates the overthrow of our government by force, has reached such proportions in our Nation that it is not only a federal problem, but a state problem as well, and in order to cope with the evil, the powers of both must be exercised.

Point. 3. Conviction of the Respondent under the Sedition Act of Pennsylvania did not result in double jeopardy merely because the "Smith Act" covers the same type of legislation in a broader field, as both the states

and Nation are deeply concerned with the preservation of a Republican form of government and the preservation of the Federal Constitution under which both must operate if the Nation is to survive, and the same act may be a transgression of the laws of both and may be punished by either or both.

I

ARGUMENT

In The Adoption of the So-called "Smith Act," Congress Did Not Pre-empt the Field of Legislation Covered by Said Act.

The respondent, Steve Nelson, was indicted under the Pennsylvania Sedition Act of 1939. (Pamphlet Laws 872, 18 Purdon's Stat. Ann., Sec. 4207, which reenacted the Sedition Act of June 26, 1919, P. L. 639) This legislation makes it a felony "(a) To make or cause to be made any outbreak * * * of violence against this state or against the United States. (b) To encourage any person * * * to engage in any conduct with the view of overthrowing or destroying * * * by any force or show or threat of force, the government of this state or of the United States." (App. II) He was tried and convicted under this indictment and was sentenced to pay a fine of $10,000.00, costs of prosecution and undergo an imprisonment of twenty years in the Allegheny County Work House. (R. 21) Prior to the time of his indictment, trial and conviction, Congress had adopted legislation known as the "Smith Act," [62 Stat. 808, 18 USCA § 2385, et seq.], which provides *inter alia* that:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The majority opinion of the Supreme Court of Pennsylvania proceeds on the premise that by the passage of the so-called "Smith Act" Congress pre-empted the legislative field in connection with the subject matter covered therein. We cannot agree with this conclusion. A careful consideration of this legislation neither expresses nor implies such an intent. Furthermore, the prosecution of individuals guilty of sedition is of vital concern to the several states, as it involves the preservation of peace and order which they have a right to protect. Each state is an integral part of the Union and is clothed with the power to and is charged with the duty of restraining "activities which are detrimental not only to the welfare of the state, but of the nation." It must be remembered that seditious acts, such as those with which the respondent was charged (Vol. I, R. 9) and convicted of (Vol. I, R. 22), were of such

nature, as a result, if continued without correction, in the destruction, not only of the State, but of the nation.

In determining whether a Federal Statute results in supersession, careful consideration must be given to the analogous cases in which this question has been considered.

In Gilbert v. Minnesota, 254 U. S. 325, (1920) the court reviewed a statute of Minnesota which made it unlawful "to interfere with or discourage the enlistment of men in the military or naval service of the United States or of the State of Minnesota." Judgment of conviction was affirmed. The principle of supersession was involved. However, the court concluded that Congressional power was not usurped nor encroached upon by the enactment by a state of a statute making it unlawful to advocate or teach that men should not enlist in the military or naval forces of the United States or of the state or that citizens of the state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States. In the course of its opinion the court explained the relationship between the several states and the United States in the following language:

> "Undoubtedly, the United States can declare war, and it, not the states, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the states as well as the United States are intimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animates them,—whether it is repellent and adverse or eager and militant,—and to maintain it, eager and militant against attempts at

its debasement in aid of the enemies of the United States is a service of patriotism, and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. Cold and technical reasoning in its minute consideration may indeed insist on a separation of the sovereignties, and resistance in each to any co-operation from the other, but there is opposing demonstration in the fact that this country is one composed of many, and must on occasions be animated as one, and that the constituted and constituting sovereignties must have power of co-operation against the enemies of all. Of such instance, we think, is the statute of Minnesota, and it goes no farther. It, therefore, has none of the character of the illustrations adduced against it, nor the possibility of conflict of powers which they condemn. This was the view of the supreme court of the state, and the court expressed it with detail and force of reasoning. The same view of the statute was expressed in State v. Holm, 139 Minn., 267, L.R.A. 1918C, 304, 166 N.W. 181, where, after a full discussion, the contention was rejected that the Espionage Law of June 15, 1917, 40 Stat. at L. 217, chap. 30, Comp. Stat. Sec. 10 212a, Fed. Stat. Anno. Supp. 1918, p. 120, abrogated or superseded the statute, the court declaring that the fact that the citizens of the state are also citizens of the United States and owe a duty to the nation, does not absolve them from duty to the state, nor preclude a state from enforcing such duty. 'The same act,' it was said, 'may be an offense or transgression of both' nation and state, 'and both may punish it without a conflict of their sovereignties.'

"We concur, therefore, in the final conclusion of the court, that the state is not inhibited from making the national purposes its own purposes, to the extent of exerting its police power to prevent its own citizens from obstructing the accomplishment of such purposes."

"The statute, indeed, may be supported as a simple exertion of the police power to preserve the peace of the state. As counsel for the state say: 'The act under consideration does not relate to the raising of armies for the national defense, nor to rules and regulations for the government of those under arms. It is simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the state has found objectionable * * *.'"

The Gilbert case cited with approval State v. Holm, 139 Minn. 267, (1918), 166 N. W. 181, in which the defendants were indicted for circulating a pamphlet in violation of the same statute. The defense contended that the Espionage Law, passed by Congress June 15, 1917, abrogated or superseded the state statute. The court in disposing of this question said:

"It is the duty of all citizens of the state to aid the state in performing its duties as a part of the nation, and the fact that such citizens are also citizens of the United States and owe a direct duty to the nation does not absolve them from their duty to the state nor preclude the state from enforcing such duty. Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 535.' True, the state cannot make or enforce requirements which are inconsistent with those of the national government, for those of the national government are paramount in case of conflict. But here there is no conflict between the state statute and the federal law, and both may subsist and be given effect.

"* * * The one is designed to enforce a duty which the citizen of the state owes to the state; the other to enforce a duty which the citizen of the United States owes to the United States. There are many acts which may violate one, but not the other, of these laws, and there are also many acts which may

> violate both, but the state statute is not necessarily invalid for that reason. There is nothing in the statute which is inconsistent with the federal law, nor which in any manner interferes with, hinders, or delays the operation of that law. The state has control of its internal affairs, and in the exercise of its police power may prescribe rules of conduct for its citizens, and may forbid whatever is inimical to the public interests, or contrary to the public policy of the state."

It will be noted from the above language that while a state cannot "make or enforce requirements which are inconsistent with those of the National Government," yet, if there is no conflict, "both may subsist and be given effect."

In the instant case we can find no conflict between the Smith Act and the Pennsylvania Statute. (App. I, App. II) The former was enacted under the sovereign powers of the Federal Government and the latter under the police powers of the state, and both are designed to preserve law and order within their respective jurisdictions.

The same conclusion was reached in Moore v. State of Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306, in which the following language was used:

> "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable * * * for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." Moore v. State of Illinois, 55 U. S. (14 How.) 13, 14 L. Ed. 306.

Likewise, in ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, the court concluded that "where a person owes a duty to two sovereigns he is amenable to both for its performance and either may call him to account."

This court held in Presser v. State of Illinois, 116 U. S. 252 (1886), 6 Sup. Ct. 580, that a law of that state providing *inter alia* that "it shall not be lawful for any body of men whatever other than the regular organized volunteer militia of this court and the troops of the United States to associate themselves together as a military company or organization * * * *" was neither in conflict with Federal statutes in existence at that time, nor was it subject to any constitutional infirmity. The court also stated that the exercise of this power by the states was necessary to the public peace, safety and good order, as otherwise it would deny the state the right to disperse assemblages organized for sedition and treason and the right to suppress armed mobs bent on riot and rapine.

In Halter v. State of Nebraska, 205 U. S. 33, 51 L. Ed. 696, (1907) this court sustained a statute of that state entitled "An Act to prevent and punish the desecration of the flag of the United States" which, among other things, made it a misdemeanor punishable by fine or imprisonment or both for any one to sell, expose for sale or have in possession for sale any article of merchandise upon which shall have been printed or placed for purposes of advertisement a representation of the flag of the United States, with certain exceptions. This court held that the protection of the national emblem against illegitimate uses was not so exclusively entrusted to the Federal Government as to prevent the state from enforcing this legislation. In the course of its opinion, the following observation was made:

> "So, a state may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling towards the state. One

> who loves the Union will love the state in which he resides, and love both of the common country and of the state will diminish in proportion as respect for the flag is weakened. Therefore a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it."

The majority opinion of the Pennsylvania Supreme Court seems to lean toward the theory that the passage of a Federal Act regulating certain objectionable activities throughout the Nation precludes any legislative action on the part of a state. However, in Kelly v. Washington, 302 U. S. 1 (1937) the court stated:

> "The principle is thoroughly established that the exercise by the state of its police power which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct or positive' that the two Acts cannot 'be reconciled or consistently stand together.'"

In none of the foregoing cases has this court intimated that a state statute, adopted in the exercise of its police powers, was invalidated by reason of the fact that Congress may have legislated on the same subject, especially where there was no conflict involved. In the instant case, the Pennsylvania Act was designed to preserve peace and order within its own jurisdiction, which certainly is not in conflict with the "Smith Act," as the latter adopts the same purpose, in a broader field and in effect builds upon state laws. In Kelly v. Washington, *supra*, it was stated that "when the prohibition of state action is not specific but inferable from the scope and purpose of federal legislation it must be clear that the federal provisions are inconsistent with those of the state to justify the thwart-

ing of state regulations." The lower court relied, at least in part, on the case of Hines v. Davidowitz, 312 U. S. 52 (1941), in support of its conclusions. In a concurring opinion in Allen-Bradley Local v. Board, 315 U. S. 740 (1942), Justice Douglas appraised the effect of the Hines case and observed that the court in that case was "dealing with a problem which had an impact on the general field of foreign relations" involving a question "as to propriety of allowing a state system of regulation to function alongside of a federal system." This problem is not presented here, as we are dealing with a situation, primarily, of internal security, which is of vital importance to both the states and the Nation. Thus, the "foreign relations" aspect, if any, must of necessity give way to this consideration.

In United States v. Pink, 315 U. S. 203 (1942), Justice Douglas again referred to the Hines case as follows:

> "We recently stated in Hines v. Davidowitz, 312 U. S. 52, 68, that the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority'; and that any state power which may exist 'is restricted to the narrowest of limits.' There, we were dealing with the question as to whether a state statute regulating aliens survived a similar federal statute. We held that it did not. Here, we are dealing with an exclusive federal function. * * *" (p. 232)

This court has recognized that the administration of criminal justice under our federal system is largely with the states. In Jerome v. United States, 318 U. S. 101 (1943), Justice Douglas, in a concurring opinion, stated that "since there is no common law offense against the United States (citing cases), the administration of crimi-

nal justice under our federal system has rested with the states except as criminal offenses have been explicitly prescribed by Congress. *We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law.*" (Emphasis supplied)

Later, in Malinsky v. New York, 324 U. S. 401 (1945), Associate Justice Frankfurter, in a concurring opinion said:

> "Apart from permitting Congress to use criminal sanctions as means for carrying into execution powers granted to it, the Constitution left the domain of criminal justice to the States. The Constitution, including the Bill of Rights, placed no restriction upon the power of the States to consult solely their own notions of policy in formulating penal codes and in administering them, excepting only that they were forbidden to pass any 'Bill of Attainder' or 'ex post facto law,' Constitution of the United States, Art. I, Sec. 10. This freedom of action remained with the States until 1868. The Fourteenth Amendment severely modified the situation. It did so not by changing the distribution of power as between the States and the central government. Criminal justice was not withdrawn from the States and made the business of federal lawmaking. The Fourteenth Amendment merely restricted the freedom theretofore possessed by the States in the making and the enforcement of their criminal laws." (pp. 412-413)

Justice Frankfurter, in Kochin v. California, 342 U. S. 165 (1952) also observed that:

> "In our federal system the administration of criminal justice is predominantly committed to the care of the States. The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers.

U. S. Const., Art. I, Sec. 8, cl. 18. Broadly speaking, crimes in the United States are what the laws of the individual States make them, subject to the limitations of Art. I, Sec. 10, cl. 1, in the original Constitution, prohibiting bills of attainder and ex post facto laws, and of the Thirteenth and Fourteenth Amendments." (p. 168)

The lower court, in coming to the conclusion that the "Smith Act" preempted the field of legislation covered thereby, cited the following cases in support of its conclusion: *Rice v. Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U. S. 566, 569 (1919); *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1915); *Southern R. Co. v. Railroad Commission*, 236 U. S. 439 (1915); *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U. S. 597 (1915), *New York Central R. Co. v. Winfield*, 244 U. S. 147 (1917); *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 603 (1926); *Savage v. Jones*, 225 U. S. 501, 533 (1912). However, a careful consideration of these decisions does not disclose that the question of preserving peace and order within the states was involved.

In each of these cases, the federal legislation involved the regulation of interstate commerce, and we submit that none of them is decisive of the question now before the court, as Section 8, Article I of the Federal Constitution specifically gives Congress the power to regulate commerce * * * among the several states * * * and it has set up a system of regulation in connection therewith which is uniform throughout the Nation. While a state under its police powers, can not regulate interstate commerce or impose a direct burden thereon, yet when the state regulation "has a real relation to the suitable protection of the people of the state it is not invalid because it may incidentally affect interstate commerce, provided it

does not conflict with legislation enacted by Congress pursuant to its constitutional authority." In Savage v. Jones, *supra*, this court had under consideration a statute adopted by the General Assembly of the State of Indiana, requiring registration and inspection of certain commercial feeding stuff sold or offered for sale in that state. The plaintiff manufactured, in Minnesota, a product known as "International Stock Food," which it distributed, through interstate channels, in the various states, including Indiana. The action was instituted to enjoin a state official of Indiana from enforcing the provisions of the act. Although the question of interstate commerce was an issue, Chief Justice Hughes, speaking for this court, found that the demurrer to the complaint was properly sustained. In the course of its opinion the court stated:

> "The state cannot, under cover of asserting its police powers, undertake what amounts essentially to a regulation of interstate commerce or impose a direct burden upon that commerce (citing cases) but when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

Again the court said:

> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. This principle has had abundant illustration. Chicago, M. & St. P. R. Co. v.

Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Crossman v. Lurman, 192 U. S. 189, 48 L. ed. 401, 24 Sup. Ct. Rep. 234; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 Ann. Cas. 1101; Northern P. R. Co. v. Washington, 222 U. S. 370, 379, ante, 237, 240, 32 Sup. Ct. Rep. 160; Southern R. Co. v. Reid, 222 U. S. 424, 442, ante, 257, 262, 32 Sup. Ct. Rep. 140.

"In Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, the supreme court of Kansas had affirmed a judgment against the railway company for damages caused by its having brought into the state certain cattle alleged to have been affected with Texas fever, which was communicated to the cattle of the plaintiff. The recovery was based upon a statute of Kansas which made actionable the driving or transporting into the state of cattle which were liable to communicate the fever. It was contended that the act of Congress of May 29, 1884, chap. 69 (23 Stat. at L. 31, U. S. Comp. Stat. 1901, p. 299), known as the animal industry act, together with the act of March 3, 1891, chap. 544 (26 Stat. at L. 1044), appropriating money to carry out its provisions, and Sec. 5258 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3564), covered substantially the whole subject of the transportation from one state to another state of live stock capable of imparting contagious disease, and therefore that the state of Kansas had no authority to deal in any form with that subject * * *.

The court held that this Federal legislation did not override the statute of the state; that the latter created a civil liability as to which the animal industry act of

Congress had not made provision. The court said, *supra*, pp. 623, 624:

> "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. Sinnot v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247."

In Reid v. Colorado, 187 U. S. 137, that state had adopted a statute to prevent the introduction into the state of diseased animals. It was insisted that this act conflicted with the animal industry act of Congress, but this court sustained the state law "for the reason that although the two statutes related to the same general subject they did not cover the same ground and were not inconsistent with each other." The court further laid down the principle that "It should never be held that Congress intends *to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'*" (Emphasis supplied).

It will be noted from the foregoing cases that this court has recognized, in many decisions, the "reserve power of

the state" to adopt legislation in the exercise of its police powers unless pre-emption is clearly manifested or where the "repugnance or conflict" is "direct and positive," even though the state act may involve Congressional authority which has been pre-empted by a Constitutional grant.

The Federal Code of Crimes and Criminal Procedure of 1948 provides *inter alia:*

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." (p. 243) (June 25, 1948, c. 645, 62 Stat. 826, Title 18, USCA, Sec. 3231)

The above Act does not disclose an intent on the part of Congress "to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Otherwise, it would mean that the mass of state legislation which has been built up since the Constitution was adopted for the preservation of law and order within their respective jurisdictions would be nullified.

After reading the majority opinion of the Pennsylvania Court in this case, the Hon. Howard S. Smith, Congressman from the Eighth District of Virginia, who was the author of the "Smith Act," stated in a letter dated February 4, 1954, and directed to the Hon. Frank Truscott, who was then Attorney General of Pennsylvania, that:

> "It was the first intimation I have ever had, either in the preparation of the Act, in the hearings before the Judiciary Committee, in the debates in the House, or in any subsequent development, that Congress ever had the faintest notion of nullifying the concurrent

jurisdiction of the respective sovereign states to pursue also their own prosecutions for subversive activities." (Dissenting Opinion of Justice Bell, Vol. 1, R. 75-76)

We submit that Congress never intended, by the adoption of the "Smith Act," to pre-empt the field of legislation covering sedition.

II

Legislation by the Several States Designed to Preserve Law and Order Within Their Respective Jurisdictions Has Always Been Recognized as Being Within Their Police Powers

The punishment of sedition as a crime against the sovereignty of the states has been recognized almost since the inception of the Constitution. In Dennis v. United States, 341 U. S. 484-521, Justice Frankfurter, in defining the limitations on freedom of speech, recognized this fact.

> "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. *The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of at least three convictions for political libels obtained between 1782 and 1804. The Pennsylvania Constitution of 1790 and the Delaware Constitution of 1792 expressly imposed liability for abuse of the right of free speech. Madison's own State put on its books in 1792 a statute confining the abusive exercise of this right of utterance. And it deserves to be noted that in writing to John Adams" which Jefferson did not rest his condemnation of the Sedition Act of 1798 on his belief in unrestrained utterance as to political matter. The First Amendment, he argued, reflected a limitation*